

Federalism in Law Enforcement

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It is a very rare day when I disagree with my good friend, Richard Willard, but this happens to be one of them.

During the past thirty-nine years, I have had the privilege of serving and being involved in law enforcement at the local, state and federal levels. During that time, I have seen a significant change in the balance between state responsibility and authority for public safety and the federal government's role in what might be called ordinary crime control.

In the 1950s, for example, there was virtually no federal involvement in the kinds of criminal justice functions that normally and traditionally had been, up until that time, left to state and local governments. Actually, the first time that the federal government got into this area in a big way was as a part of the Great Society. In 1965, Lyndon B. Johnson appointed a crime commission which made a number of recommendations for a much larger role for the federal government. This led to what became known as the Omnibus Safe Streets and Crime Control Act of 1968. With that came a whole new administration in the Department of Justice, the Law Enforcement Assistance Administration.

But even there, the emphasis was upon the federal government providing assistance to local law enforcement. To be sure, as with most things, the federal government gives, but it also attaches strings to what it gives. Therefore, a great many requirements were placed on the acceptance of these funds. Still, the primary emphasis was upon local law enforcement.

Curiously enough, in the Nixon Administration, there was a much greater involvement of the federal government in the actual process of law enforcement. In the '80s and now in the '90s, it seems like almost every election year we have a crime bill which incorporates

in it whatever might have been more or less horrendous or front page news during the past few years, giving the impression that somehow Congress is doing something about the crime problem.

I agree entirely with what Richard Willard has been saying about presidents and crime. Nowhere in a president's job description, however, up until fairly recently, have we seen dealing with local crime as one of those major functions that a president is supposed to handle. That is really one of the problems that I find with this whole business of the federal government getting involved in local crime control. The reasons for the federal involvement are usually pretty spurious. It is often the result of politics or public opinion rather than any real need or any real justification.

When Congress decides that something is politically salient, it decides to pass a law whether it is necessary or not. As our moderator was reeling off the list of federal crimes, most of them if not all of them that he read are and have been handled by state law. Church burning, for example, dates back to the common law brought over from England. Arson is one of the earliest common law crimes.

As a matter of fact, if anything, the balance was so far the other way that, as you remember, until just shortly after the assassination of President Kennedy, few believed there was a need to have a law against the killing of a president or federal officers in the federal criminal code. Indeed, had Lee Harvey Oswald lived and not been assassinated himself, he would have been tried under the laws of Texas. I think the whole country would have been satisfied that justice would have been done in that case.

Instead, if there is a carjacking or a rash of carjackings, we suddenly have a federal carjacking law. If there are churches being burned, we suddenly have a federal church burning law. If violence against women is a hot topic, we have a domestic violence against women law, as we have on the books now. Very few people have looked into whether these offenses are actually prosecuted very much, but the statutes are on the books, and therefore, they can be prosecuted, usually dependent upon the whim of a United States attorney.

The enactment of the laws—and the decision whether to use those laws in a particular case—are often political choices rather than a matter of criminal justice policy. Even in police work, one crime that we have had for years in which the FBI and local police shared jurisdiction had been bank robberies. That is because in the 1930s the federal government started chartering banks and there was concurrent jurisdiction between the local authorities and the FBI over bank robberies.

Knowing from personal experience working in a district attorney's office, a very spectacular bank robbery usually gets front page attention. If the culprit is caught very quickly after the event, the FBI takes the case to federal court. If the investigation languishes and the culprit cannot be found, it remains a state case for the detectives to deal with. Such is the kind of climate within which we deal with the dichotomy between federal and state jurisdictional lines.

Let me make three points that are important to understand. First of all, there is a big distinction between cooperation among federal, state and local authorities in dealing with crime problems as opposed to the federal government supplanting local law enforcement. Cooperation was a hallmark of our administration in terms of the federal authorities working with local authorities in particular crime situations where their work came together.

Secondly, I think there is definitely a vital federal role in interstate and international crime. Only the federal government can handle crime under those circumstances, and its involvement does take care of the mobility problem that Richard Willard mentioned.

Third, it is appropriate for the federal government to provide certain criminal justice services in areas where the states themselves cannot accomplish a necessary function by themselves. Obviously, you need a central agency to have a central fingerprint and identification resource. You need a central agency for the collection of criminal justice statistics. You need technical assistance that can be provided by the federal government. That is a far cry from the federal government taking on the principal role of public safety which has always been, in our tradition, a local matter.

Why should there be a bar against the federal government duplicating or taking on the same responsibilities by statute or by practice as local law enforcement? It may be a quaint notion these days, but one of the reasons is the Constitution. There the drafters of the Constitution clearly intended the states to bear the responsibility for public safety. Some states may do it well, and some may do it not as well. The Constitution is not a document that is designed necessarily for perfection or even efficiency. Concerns about oppressive use of governmental power motivated the leaders of our country at its founding to make a clear distinction between where the police power was to be rested. As a matter of fact, to reassure the states that the federal government would not usurp state sovereignty, Alexander Hamilton wrote in the Federalist Number 17 that law enforcement would be the responsibility of the states.

There are several other reasons besides the Constitution for keeping the federal government out of local law enforcement. One of them is that there is really no need for federal involvement. The laws that Congress has recently passed on carjacking, arson and so on, are already on the books of every state and are regularly and effectively enforced.

There is also no need for federal resources. Quite frankly, when the federal government steps in, it diverts attention from the responsibility of local officials to do the things they ought to be doing in terms of crime control and causes confusion about who is in charge when it comes to matters of crime.

The progress against crime in this country has not been the result of any federal effort. It has been the result of local police officers doing a better job and local judges, for the most part, putting criminals in prison for longer periods of time, because of the seriousness or the frequency of their offenses.

There are many other problems when the federal government gets involved with local law enforcement and supplants or otherwise tries to take over the functions of local law enforcement. It violates double jeopardy. As you know, we have dual sovereignty and the fact that a person may be tried and acquitted for a crime in the state courts does not prevent him from being tried and perhaps convicted in the federal courts for exactly the same offense or exactly the same set of facts. We certainly had such a situation in the

Rodney King case in California, where police officers were acquitted, and properly so in my opinion, by a jury in the state court. The federal government then decided to try them under federal statutes applied to the same set of circumstances and the same facts.

Federal involvement also poses unnecessary and major costs. The federal court system, which has fewer judges than the number of trial judges in the state of California alone, bears high costs in trying normal criminal cases. Utilizing the limited resources of the federal government to handle things like domestic violence or deadbeat dads, is also a rather wasteful use of the 10,000 agents of the FBI who handle the entire country, when many police officers and other local law enforcement authorities are readily available.

Federalizing crime undermines the idea that the states should be free to experiment with their own systems, to be in effect laboratories of government effectiveness. Furthermore, it shifts accountability, and as I mentioned, certainly confuses the citizens as to who is in charge. They don't know to talk to their local chief of police, the local sheriff, their local legislator, or to write their congressman when Congress keeps proclaiming that it is solving the crime problem or the president says he is the one who is putting 100,000 police officers on the street.

Federalization of crime invites selective prosecution, and disparate enforcement, and punishment. Federal officials determine, usually on the basis of political factors, whether they will get involved in a case. The fact that the laws are on the books allows them to do so at whatever whim they may decide to get involved.

So really what we need in this country is a much better and clearer balance and distribution of responsibility between federal and local law enforcement. For the ordinary street crimes, the matters which traditionally have been within the realm of the police power of the states, local enforcement should suffice. The federal government can handle the ample number of crimes that are interstate and international, which certainly deserve the expertise and the attention that the federal authorities can give.

What we really need are some statesmen who are willing to stand up and say, "let's not make a federal case out of this."

**Edwin Meese III was the 75th Attorney General of the United States, and is currently the Ronald Reagan fellow at the Heritage Foundation. This lecture was presented during the Federalist Society's 1997 National Convention.*